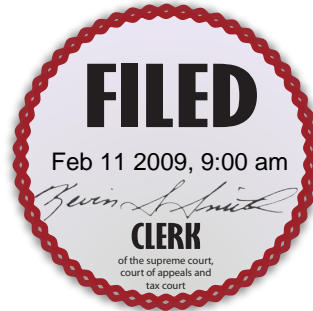


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

STEVEN KNECHT
Vonderheide & Knecht, P.C.
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

THOMAS D. PERKINS
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

GWENDOLYN L. WEIS,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 91A02-0806-CR-530

APPEAL FROM THE WHITE SUPERIOR COURT
The Honorable Robert B. Mrzlack, Judge
Cause No. 91D01-0604-FB-82

February 11, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Gwendolyn Weis appeals her sentence for Class B felony burglary and the trial court's order directing her to pay \$470 in restitution. We affirm in part and remand.

Issues

Weis presents the following issues for our review:

- I. whether the trial court properly ordered \$470 in restitution; and
- II. whether her twenty year sentence, with fifteen years executed, is appropriate.

Facts

On April 15, 2006, Weis broke into Travis and Heather Cooley's Monticello home. Weis entered the home with Heather Harris. The Cooleys woke up to two people wearing ski-masks in their bedroom. On April 19, 2006 the State charged Weis with Class B felony burglary. Weis pled guilty to the offense on March 28, 2007. The terms of the plea agreement provided that Weis be sentenced to twenty years in the Department of Correction, with the executed portion of her sentence capped at fifteen years. Pursuant to the plea agreement, Weis was free to argue for less executed time.

The trial court sentenced Weis to twenty years, with five suspended and fifteen executed. It ordered Weis to pay \$470 in restitution to the Cooley family. This appeal followed.

Analysis

I. Restitution

The State concedes that Weis was improperly required to pay restitution. A restitution order must be supported by evidence of actual loss sustained by the victims of a crime. Rich v. State, 890 N.E.2d 44, 49 (Ind. Ct. App. 2008), trans. denied. Although the Sheriff's report lists some items that were missing, the record is void of any evidence of the actual loss sustained by the Cooleys. When restitution is a condition of probation, a proper restitution order also includes an inquiry as to the defendant's ability to pay. Ind. Code § 35-38-2-2.3(a)(5). We remand this case to the trial court in order for the trial court to address the restitution issue. It is unclear whether the trial court intends this restitution to be a condition of Weis' probation or a wholly separate order. The trial court should more fully develop the record concerning the amount of restitution, Weis's ability to pay, and the manner in which it will be paid.

II. Sentence

Weis argues that the fifteen-year executed portion of her sentence is inappropriate in light of her character. See Ind. Appellate Rule 7(B). Although Indiana Appellate Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id.

Weis's plea provided that she would receive a twenty-year sentence, and she does not dispute the total length. She only argues on appeal that the executed portion of the

sentence should be reduced to only six years, and the remaining fourteen years should be suspended. Weis contends her character does not merit such a long executed sentence. She points to her minimal criminal history, her low self-esteem, and her substance abuse problems. Weis's criminal history includes a 2000 conviction for Class C felony burglary. She violated probation for that offense three times by testing positive for illegal substances. Weis has been treated for depression and admitted to being addicted to methamphetamine. She explained at sentencing and stresses on appeal that she was under the influence of her girlfriend at the time of the burglary. It is unclear how this situation enhances her own character, considering that Weis still actively participated in burglarizing the Cooley's home. The trial court acknowledged Weis's guilty plea, substance abuse, and mental health issues but concluded that those elements did not warrant a reduction to the capped fifteen years of executed time. We agree.

Weis has not presented any argument regarding why the nature of her offense merits a reduction to her sentence. "[A] revision of a sentence under Indiana Appellate Rule 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of both the nature of his offenses and his character." Williams v. State, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008). Although the burglary was not especially egregious, Weis did break and enter a home in the middle of the night, leaving the homeowners to be startled and awakened by quite a frightening prospect—strangers in their bedroom. We cannot conclude that anything in Weis's character and the nature of her offense merits a reduction to the executed portion of the sentence.

Conclusion

We remand to the trial court for clarification of the restitution order. Weis's twenty year sentence, with fifteen years executed, is appropriate. We affirm in part and remand.

Affirmed in part and remanded.

BAILEY, J., and MATHIAS, J., concur.